

ADR Newsletter

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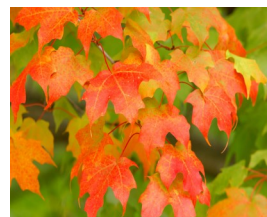
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The impact of actions on others: The recent NFL Referee Association dispute.

~ B.J. Ocker, ADR Specialist



Recently, the national news was filled with discussions about questionable calls during NFL football games. Replacement referees were used for the pre-season games and the first three weeks of the regular season. This action was used to ensure continuation of the football season due to the referee lockout that began in June.

At first, I dismissed the impact of replacement referees on the outcome on the season.

Then it happened... I have a son that is involved with fantasy football where he attends school. He is a sports management major, and it was his words that changes my view.

"These replacement refs are messing up the whole season. One bad call changes the results of the game. There's no way my fantasy team will do well until the real refs are back".

The dispute was between the NFL and the Referee Union and yet the impact has reached far beyond the outcome of a collective bargaining agreement. The losses of some teams can be related to disputable calls, as well as my son's fantasy team success.

We as mediators need to keep this lesson in mind when working with parties in dispute. The effects of the actions or inactions of the disputing parties may have an influence on others in their work areas, or with their families until the dispute is resolved. Mediators can use this concept during a mediation session to explore other methods to resolve a dispute. By inquiring in to how their conflict may be impacting others, it is possible to change the direction of the resolution process by providing a new perspective and assist the parties to consider new options for settlement.

B.J. Ocker -Editor

DID YOU KNOW...**Disability Employment Awareness Month - *October***

In 1945, in an effort to assist disabled veterans, Congress designated the first week of October as National Employ the Physically Handicapped Week. In the 1970s, a historic shift in disability public policy occurred. For the first time, the exclusion of people with disabilities was viewed as discrimination. The efforts of disability activists led to significant changes in laws, such as the passage of the Americans with Disabilities Act in 1990 and the designation of a full month to recognize the potential of America's millions of working-age people with disabilities.

American Indian Heritage Month - *November*

Since 1900, many have sought to recognize the great influence American Indians have had on the history, cultural development, and continuing growth of the US. Various dates and weeks were acknowledged until 1976, when Congress authorized a week in October as Native American Awareness Week. Finally, in 1990, the month of November was chosen because it is traditionally a time when many American Indians gather for fall harvest festivals, world-renewal ceremonies, and powwows.

**Looking for ADR resources?**

The Mediation Channel is an on-line resource for news related to mediation, negotiation, and dispute resolution.

For more information go to:
www.mediationchannel.com



ADVANCE Your Knowledge and Skill in
Managing Conflict and Resolving Disputes through Mediation
by taking classes at the Justice Center of Atlanta
sponsored by the Office of Resolution Management,
Workplace ADR Office.

Targeted Audience: Senior Executives, GS-14-15s, GS-12-13 Supervisors,
LVA Participants, and
Title-38 Equivalents who are in Supervisory Positions

Taking an **ADVANCE** step toward Managing Conflict and Resolving Disputes through Mediation training is a key initiative in VA's Transformation into the 21st Century, and one of several training programs and professional development services offered through **ADVANCE**. The Secretary, Deputy Secretary, and Assistant Secretary for Human Resources and Administration feel strongly that VA's senior leaders must possess the knowledge and skill to effectively manage conflict and resolve disputes. It is the Office of Resolution Management's (ORM) role to provide you with the resources and support you need to achieve this goal. Managing Conflict and Resolving Disputes Training is conducted by the Justice Center of Atlanta (JCA); this institution has led the field of training and practice in conflict resolution for over 30 years. The JCA is a nationally recognized provider of top quality practice and instruction in mediation, and has gained recognition in the U.S. Government Accounting Office report of August 1997 as being "...recognized as one of the leading institutions in the United States for the practice and teaching of mediation."

The Managing Conflict and Resolving Disputes through Mediation training is a three day course, and it provides an opportunity to examine the factors that contribute to workplace conflict. It offers tools that managers can use to prevent these situations from escalating and diverting valuable time, resources, and energy from our mission. The course is balanced to include information on how to better manage conflict (i.e., asking effective questions, dealing with difficult people, negotiation skills), and understanding the mediation process. While not asking you to become a professional mediator among your many other responsibilities at VA, it is hoped that by spending in-depth time studying, discussing, and trying the myriad of techniques and communication skills related to the mediation process, you will adopt new approaches, ideas, and skills in dealing with disputes. Being familiar with the mediation process when you participate as a management official, you will be better prepared to maximize positive results. All of this will benefit you, all employees with whom you interact, and ultimately, the Veterans that you serve.

The dates for this 3-day training session are: September 11-13, October 23-25, November 6-8, December 11-13, 2012, January 15-17, February 26-28, March 19-21, April 23-25, May 21-23, 2013. You may register in TMS at the following link: <https://www.tms.va.gov/plateau/user/login.do>

All questions regarding these classes may be directed to Rita Reese, Acting ADR Manager, in the Workplace ADR Office at rita.reese@va.gov.

In honor of National Disability Employment Awareness Month, please enjoy the following article from Mediate.com, written by Douglas R. Andres and Clay D. Creps.

The Interactive ADA Accommodation Process

The Americans With Disabilities Act (“ADA”) requires employers to reasonably accommodate the disabilities of their employees. According to the implementing regulations, reasonable accommodations are to be determined by what is termed an “interactive process.” Those regulations, which have been given deference by the federal courts, envision the following steps:

First, the employer should analyze the particular job involved to determine its purpose and essential functions.

Second, the employer and the individual with the disability should work together to identify what barriers exist to that individual’s performance of a particular job function. This analysis should include a review of the individual’s abilities and limitations and a determination as to which factors in the work environment or job tasks pose difficulties.

Third, the employer, working with the individual with a disability, should identify a range of possible accommodations that have the potential to remove the difficulties, either in the work environment or job tasks, and which would allow the individual to perform the essential functions of the job. Engaging in an interactive process, through which the employer and employee work together to arrive at a reasonable accommodation, is likely the employer’s best means of avoiding liability for disability discrimination and the failure to reasonably accommodate a disabled employee. The interactive process leads to better decisions and creates immunity from damages in a claim of failure to reasonably accommodate.

Fourth, having identified various possible accommodations, the employer should assess the effectiveness of each accommodation and the preference of the individual to be accommodated and then determine whether the various accommodations would pose an undue hardship upon the employer.

Recently, in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), the Ninth Circuit Court of Appeals (whose decisions govern the Western states) addressed the interactive process in depth, noting that “the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and . . . this obligation is triggered by an employee or an employee’s representative giving notice of the employee’s disability and the desire for an accommodation.”

The Barnett case establishes guidelines for the interactive process, and the court’s discussion is extremely helpful to employers working with employees with disabilities. According to the court, an employer should:

Explore Accommodation Options in Good-Faith. “The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively.” Therefore, employers must communicate in good faith with disabled employees about possible accommodations.

Communicate Directly with the Employee. “Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.” Therefore, the obligation to communicate directly and exchange essential information rests on both the employee and the employer. This means that the employee must provide relevant medical information if requested by the employer. It is vitally important that the employer not delay the process or set up roadblocks that make it difficult for the employee. Probably the best way to start the interaction is to simply ask the employee, “What can I do for you?”

The Interactive ADA Accommodation Process (continued)

Demonstrate Good Faith. “In order to demonstrate good faith, employers can point to cooperative behavior which promotes the identification of an appropriate accommodation.” Cooperative behavior includes:

- making the process easy for employees;
- providing forms for requests for accommodations to help document the process.

(Note that an employer must still entertain a request for an accommodation even if it is not in writing.);

- making time for dealing with these issues;
- training supervisors not to make employees feel that such requests are an unwelcome burden; and
- responding promptly to employee requests for reasonable accommodation.

Identify the Barriers to Job Performance. “In order to identify the barriers to job performance, employers engaging in the interactive process must consult and cooperate with disabled employees so that both parties discover the precise limitations and types of accommodations which would be the most effective. The evaluation of proposed accommodations requires further dialogue and an assessment of the effectiveness of each accommodation, in terms of enabling the employee to successfully perform the job.”

Therefore, under the ADA, it is improper to force an accommodation on an employee without consulting with the employee or assessing the effectiveness of the accommodation with the employee. In *Barnett*, the court held that the employer did not engage in the interactive process in good faith because it rejected the employee’s proposed accommodation, but, at the same time, failed to offer any practical alternatives. It is important to remember that the burden is on both parties, the employee and the employer.

The court makes no bones about it — employers are required to engage in the interactive process. Thus, an employer neglects (or refuses) to engage in the interactive process at its own peril. Although the court did not hold that there is an independent claim for failure to engage in the interactive process, the actual consequences are just as severe.

The failure to participate in the interactive process in good faith deprives the employer of its immunity from damages for failure to reasonably accommodate an employee. Generally, if an employer fails to provide an employee with a reasonable accommodation, that employee can recover damages. However, if the employer engages in the interactive process in good faith, that employer will be immune from damages.

More significant is the ruling in *Barnett* that an employer failing to engage in the interactive process cannot obtain Summary Judgment, meaning that the case cannot be quickly decided by the court, but has to be decided by a jury trial. As an employer, you can greatly reduce the risk of ADA liability by engaging in the interactive process in good faith. Have an open dialogue with your employees and work with them to find solutions.

**Workplace ADR Program****Department of Veterans Affairs**

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Mediation:***A Solution to Workplace Disputes***

The Workplace ADR Program solicits articles for VA's quarterly ADR newsletter. The purposes of the newsletter are to communicate information relating to the use of ADR in workplace disputes, and to serve as a resource for those interested in learning more about ADR and its application within VA.

We invite you to submit ideas and articles for the newsletter through your respective administrations:

- ◇ VHA to Sherron McHaddon (10A2E),
- ◇ VBA to Johnny Logan (20M42),
- ◇ NCA to Nicole Maldon (40A),
- ◇ VACO staff offices to your VACO ADR Liaison,
- ◇ Labor organizations to your ADR Council Representative.

We are looking for ideas and articles on ADR related topics, noteworthy activities, initiatives, accomplishments, best practices, or other items designed to educate and inform VA employees and managers on ADR and its benefits in addressing workplace disputes. We hope the VA community will find the newsletters a useful resource for obtaining interesting and helpful information representing ADR activity throughout VA.

For more information, visit our website:
<http://vaww.va.gov/adr/>

**Core Values "I CARE"**

Integrity

Commitment

Advocacy

Respect

Excellence